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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/974,634	10/09/2001	Mengtao Pete He	29930.5300	9940

7590 11/26/2004
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EXAMINER

VO, HAI

ART UNIT	PAPER NUMBER
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1771

DATE MAILED: 11/26/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Advisory Action

Application No.

09/974,634

Applicant(s)

HE ET AL.

A1

Examiner

Hai Vo

Art Unit

1771

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 12 November 2004 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE. Therefore, further action by the applicant is required to avoid abandonment of this application. A proper reply to a final rejection under 37 CFR 1.113 may only be either: (1) a timely filed amendment which places the application in condition for allowance; (2) a timely filed Notice of Appeal (with appeal fee); or (3) a timely filed Request for Continued Examination (RCE) in compliance with 37 CFR 1.114.

PERIOD FOR REPLY [check either a) or b)]

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
- b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection. **ONLY CHECK THIS BOX WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).**

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

1. ☐ A Notice of Appeal was filed on _____. Appellant's Brief must be filed within the period set forth in 37 CFR 1.192(a), or any extension thereof (37 CFR 1.191(d)), to avoid dismissal of the appeal.
2. ☐ The proposed amendment(s) will not be entered because:
- (a) ☐ they raise new issues that would require further consideration and/or search (see NOTE below);
- (b) ☐ they raise the issue of new matter (see Note below);
- (c) ☐ they are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
- (d) ☐ they present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____

3. ☐ Applicant's reply has overcome the following rejection(s): _____.
4. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
5. ☒ The a) ☐ affidavit, b) ☐ exhibit, or c) ☒ request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
6. ☐ The affidavit or exhibit will NOT be considered because it is not directed SOLELY to issues which were newly raised by the Examiner in the final rejection.
7. ☒ For purposes of Appeal, the proposed amendment(s) a) ☐ will not be entered or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.

The status of the claim(s) is (or will be) as follows:

Claim(s) allowed: _____.

Claim(s) objected to: _____.

Claim(s) rejected: 3.

Claim(s) withdrawn from consideration: _____.

8. ☐ The drawing correction filed on _____ is a) ☐ approved or b) ☐ disapproved by the Examiner.
9. ☐ Note the attached Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____.
10. ☐ Other: _____

Continuation of 5. does NOT place the application in condition for allowance because: of the following reasons. Applicants argue that the device of Smith can not be inverted because the device of Smith is not a wick. The arguments are found persuasive for patentability. It is reminded that article claims must be structurally distinguishable from the prior art. While features of the article may be recited either structurally or functionally, claims directed to an article must be distinguished from the prior art in terms of structure rather than function. In re Schreiber, 128 F. 3d 1473, 1477-78, 44 USPQ2d 1429, 1431-32 (Fed. Cir. 1997). The device of Smith meets all the structural limitations as required by the claims. The device of Smith is made of porous high density polyethylene having the porosity and average pore size within the claimed ranges. Further, the device of Smith has the transfer rate within the claimed range. Therefore, it is the examiner's position that the device of Smith would inherently perform the same function as the porous polymeric wick of the present invention. It is believed that when the device of Smith is inverted the fragrance oil to be transported by the porous polyethylene material would not leak from the porous material. It seems from the claim, if one meets the structure recited, the properties must be met or Applicant's claim is incomplete. Like material has like property. This is in line with In re Spada, 15 USPQ 2d 1655 (1990) which holds that products of identical chemical composition can not have mutually exclusive properties. Further, Applicants go on to state that because the device of Smith discloses leaking under some conditions, it is possible that the Smith device would leak. The examiner disagrees. Smith discloses the porous material was impregnated with liquid fragrance until the surface of the support was not dripping liquid fragrance. Likewise, the device of Smith is made without leaking. Additionally, there is no teaching or suggestion in the Smith invention that the liquid fragrance leaks from the porous material when the porous material is inverted. Accordingly, the art rejections are thus sustained.

Hai Vo

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